

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

**REX - REAL ESTATE EXCHANGE,
INC.,**

Plaintiff,

V.

ZILLOW, INC.; ZILLOW GROUP, INC.; ZILLOW HOMES, INC.; ZILLOW LISTING SERVICES, INC.; TRULIA, LLC; and THE NATIONAL ASSOCIATION OF REALTORS,

Defendants.

C21-312 TSZ

ORDER

THIS MATTER comes before the Court on a motion to dismiss, docket no. 101,

Plaintiff's amended complaint filed by defendant the National Association of REALTORS® (“NAR”). Having reviewed all papers filed in support of, and in opposition to, the motion, the Court enters the following Order.

1 **Background**

2 On September 2, 2021, the Court entered an Order,¹ docket no. 98, denying in part
 3 and granting in part NAR's motion under Federal Rule of Civil Procedure 12(b)(6) to
 4 dismiss Plaintiff's claims, docket no. 84. The Court denied NAR's motion as to
 5 Plaintiff's antitrust claims brought under Section 1 of the Sherman Act, 15 U.S.C. § 1,
 6 and the Washington Consumer Protection Act ("CPA"), RCW 19.86.030. The Court
 7 granted NAR's motion as to Plaintiff's claims for false advertising or deceptive acts
 8 under the Lanham Act, 15 U.S.C. § 1125, and the CPA, RCW 19.86.020, and dismissed
 9 the claims without prejudice and with leave to amend.²

10 On September 30, 2021, Plaintiff filed an amended complaint, docket no. 99. In
 11 its amended complaint, Plaintiff maintains its claims against NAR for alleged violations
 12 of Section 1 of the Sherman Act and the CPA, RCW 19.86.030 (Counts I & VI), and
 13 Section 1125 of the Lanham Act and the CPA, RCW 19.86.020 (Counts III & V).
 14 Am. Compl. at ¶¶ 131–41, 153–62, 179–88 & 189–201 (docket no. 99). Plaintiff also
 15 brings a new claim against NAR, alleging defamation in violation of Washington law
 16 (Count VII). *Id.* at ¶¶ 202–216. Plaintiff relies on an agency theory to establish NAR's
 17 liability, and alleges that Zillow acted as NAR's agent when Zillow designed its website
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 20 ¹ The relevant background of this action is set forth in the Court's Order, docket no. 98.
 21 ² The Court concluded that Plaintiff failed to state a Lanham Act or CPA claim against NAR for false
 22 advertising or deceptive acts because Plaintiff's initial complaint relied on conclusory allegations that did
 23 not plausibly allege that NAR had any involvement in designing or encouraging Zillow's allegedly
 misleading website displays.

1 displays. *Id.* at ¶¶ 156, 184 & 207. NAR requests that the Court dismiss all of Plaintiff's
2 claims.

3 **Discussion**

4 **1. Article III Standing**

5 The Court previously concluded that Plaintiff has standing to bring its claims
6 against NAR. Order at 7–8 (docket no. 98). NAR takes a second bite at the apple, and
7 argues that Plaintiff's amended complaint confirms that NAR's actions did not cause
8 Plaintiff's alleged injuries. NAR argues that it did not cause Plaintiff's injuries because
9 Plaintiff alleges that some, but not all, NAR-affiliated multiple listing services ("MLSs")
10 reviewed, approved of, or required Zillow to implement its new displays. *See* Am.
11 Compl. at ¶¶ 83–85. Because Plaintiff's amended complaint suggests that some NAR-
12 affiliated MLSs did not require Zillow to change its websites, NAR contends that its rules
13 cannot have caused Plaintiff's injuries. As before, NAR ignores Plaintiff's allegations
14 that NAR is a direct participant in the challenged conduct. Plaintiff challenges the "rules
15 written by NAR and enforced by its member MLSs." *Id.* at ¶ 7. Plaintiff's amended
16 complaint continues to allege that Zillow changed its websites as "a result of [Zillow]
17 joining the MLS." *Id.* at ¶ 105. Plaintiff also alleges that a Zillow representative stated
18 that, "[i]n general these changes are for us to comply with MLS rules." *Id.* The Court
19 concludes that Plaintiff's alleged injuries are fairly traceable to NAR's conduct. The
20 amended complaint plausibly alleges that Zillow changed its websites because of NAR's
21 rules.

1 **2. Rule 12(b)(6) Standard**

2 Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not
3 provide detailed factual allegations, it must offer “more than labels and conclusions” and
4 contain more than a “formulaic recitation of the elements of a cause of action.” *Bell Atl.*
5 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must indicate more than
6 mere speculation of a right to relief. *Id.* When a complaint fails to adequately state a
7 claim, such deficiency should be “exposed at the point of minimum expenditure of time
8 and money by the parties and the court.” *Id.* at 558. A complaint may be lacking for one
9 of two reasons: (i) absence of a cognizable legal theory, or (ii) insufficient facts under a
10 cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th
11 Cir. 1984). In ruling on a motion to dismiss, the Court must assume the truth of the
12 plaintiff’s allegations and draw all reasonable inferences in the plaintiff’s favor. *Usher v.*
13 *City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The question for the Court is
14 whether the facts in the complaint sufficiently state a “plausible” ground for relief.
15 *Twombly*, 550 U.S. at 570. If the Court considers matters outside the complaint, it must
16 convert the motion into one for summary judgment. Fed. R. Civ. P. 12(d). If the Court
17 dismisses the complaint or portions thereof, it must consider whether to grant leave to
18 amend. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

19 **3. Antitrust Violations**

20 NAR moves to dismiss Plaintiff’s antitrust claims. The Court previously denied
21 NAR’s motion to dismiss Plaintiff’s antitrust claims under Section 1 of the Sherman Act
22 and the CPA, RCW 19.86.030. In its amended complaint, Plaintiff does not substantively
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1 amend its antitrust claims against NAR. *Compare* Compl. (docket no. 1) *with* Am.
2 Compl. (docket no. 99). NAR argues that Plaintiff's "new factual allegations,"
3 concerning the conduct of "some" NAR-affiliated MLSs defeats Plaintiff's antitrust
4 standing. However, Plaintiff's allegation that only some NAR-affiliated MLSs engaged
5 in the anticompetitive application of NAR's rules is not new. *See* Compl. at ¶ 161; Am.
6 Compl. at ¶ 198. Despite NAR's contention, the amended complaint does not contain
7 new allegations that support dismissing Plaintiff's antitrust claims.

8 Accordingly, the Court DENIES NAR's motion to dismiss, docket no. 101, the
9 antitrust claims brought under Section 1 of the Sherman Act and the CPA,
10 RCW 19.86.030 (Counts I & VI).

11 **4. False Advertising or Other Deceptive Acts**

12 The Court previously dismissed Plaintiff's claims for false advertising or
13 deceptive acts brought under the Lanham Act and the CPA, RCW 19.86.020. The Court
14 concluded that Plaintiff's initial complaint, docket no. 1, did not contain allegations
15 explaining what NAR did to design or encourage the labeling system on Zillow's
16 websites, let alone when, where, and how NAR did it. These allegations remain absent
17 from Plaintiff's amended complaint. To cure the identified deficiencies, Plaintiff now
18 embraces an agency theory, claiming that Zillow acted as NAR's agent when changing its
19 websites. Am. Compl. at ¶¶ 156 & 184.

20 "In Washington, '[t]he two elements of an agency are mutual consent, and control
21 by the principal of the agent.'" *Env't Transp. of Nev., LLC v. Mod. Mach. Co.*, No. C18-
22 5445, 2020 WL 1847747, at *4 (W.D. Wash. Apr. 13, 2020) (citing *Uni-Com Nw., Ltd. v.*

1 *Argus Publ'g Co.*, 47 Wn. App. 787, 796, 737 P.2d 304 (1987)). “Washington will not
2 impose liability for conduct that a defendant does not directly or actually control.” *Id.*
3 (citing *McLean v. St. Regis Paper Co.*, 6 Wn. App. 727, 732, 496 P.2d 571 (1972)); *see*
4 *also Bastida v. Nat'l Holdings Corp.*, C16-388, 2016 WL 4250135, at *2 (W.D. Wash.
5 Aug. 4, 2016) (dismissing plaintiff’s complaint because plaintiff failed to plead sufficient
6 facts to establish that the defendant had an agency relationship with a subsidiary
7 corporation).

A. Pleading Standard

9 Federal Rule of Civil Procedure 9(b) provides that “in alleging fraud or mistake, a
10 party must state with particularity the circumstances constituting fraud or mistake.” Fed.
11 R. Civ. P. 9(b). Plaintiff asserts that Rule 9(b)’s heightened pleading standard does not
12 apply to its allegations that Zillow acted as NAR’s agent. However, “[t]he fact that
13 Plaintiff is proceeding under an agency theory does not absolve Plaintiff of Rule 9(b)’s
14 requirement to explain [the defendant’s] role in the false statements.” *RPost Holdings,*
15 *Inc. v. Trustifi Corp.*, No. CV11-2118, 2011 WL 4802372, at *4 (C.D. Cal. Oct. 11,
16 2011); *see also Morici v. Hashfast Techs. LLC*, No. 14-cv-00087, 2015 WL 906005, at *4
17 (N.D. Cal. Feb. 27, 2015); *Jackson v. Fischer*, No. C11-2753, 2013 WL 6732872, at *17
18 (N.D. Cal. Dec. 20, 2013) (“[W]here a plaintiff alleges that a defendant is liable for fraud
19 under an agency theory, Rule 9(b) requires that the existence of the agency relationship
20 be pled with particularity.”).

1 **B. NAR's Allegations**

2 Plaintiff has not pleaded an agency relationship with particularity under Rule 9(b).

3 Plaintiff alleges that, "Zillow acted as NAR's agent in moving REX listings to 'Other
4 Listings' to enforce NAR's rules, including its co-mingling and segregation rules" and
5 that, "Zillow acted as a NAR member and NAR agent to implement NAR's co-mingling
6 and segregation rules in changing the description of REX-listed homes." Am. Compl. at
7 ¶¶ 156 & 184. The amended complaint contains no factual allegations to support the
8 existence of an agency relationship between Zillow and NAR, and Plaintiff has not
9 pled the elements of agency. Plaintiff fails to plead any facts alleging that NAR
10 exercised control over the design of Zillow's labeling system. Plaintiff's allegation that
11 Zillow joined NAR and abided by NAR's rules is too conclusory to plausibly allege that
12 Zillow acted as NAR's agent when designing its website displays.

13 Even under Federal Rule of Civil Procedure 8(a)(2)'s less demanding pleading

14 standard, Plaintiff's allegations do not plausibly allege that Zillow acted as NAR's agent.
15 Plaintiff's allegations are nothing more than legal conclusions unsupported by any factual
16 assertions. Although the Court recognizes that Plaintiff need not provide detailed factual
17 allegations under Rule 8(a)(2), it must offer "more than labels and conclusions." *See*
18 *Twombly*, 550 U.S. at 555. Plaintiff has failed to plead any facts alleging that NAR
19 manifested consent for Zillow to act on its behalf, and subject to its control, with respect
20 to the labeling system for Zillow's websites.

21 The Court therefore GRANTS NAR's motion to dismiss, docket no. 101, as to the

22 claims for false advertising or deceptive acts brought under the Lanham Act and the

1 CPA, RCW 19.86.020 (Counts III & V), and these claims are DISMISSED with
 2 prejudice.³

3 **5. Defamation**

4 In its amended complaint, Plaintiff brings a defamation claim against NAR and
 5 Zillow. Am. Compl. at ¶¶ 202–216. To state a defamation claim in Washington, a
 6 plaintiff must plead four elements: (1) a false statement, (2) publication, (3) fault, and
 7 (4) damages. *Duc Tan v. Le*, 177 Wn.2d 649, 662, 300 P.3d 356 (2013) (citing *Herron v.*
 8 *KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989)). The Court applies the
 9 pleading standards of Rule 8(a)(2) when evaluating Plaintiff’s defamation claim. *See*
 10 *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, No. C10-861, 2011 WL 13100746, at *2
 11 (W.D. Wash. May 19, 2011) (explaining that the tort claim of defamation is not subject to
 12 the heightened pleading standards of Rule 9(b)). The doctrine of vicarious liability can
 13 apply to defamation claims. Restatement (Second) of Agency § 254 (Am. L. Inst. 1958).

14 Plaintiff does not allege that NAR made any false statements. Instead, Plaintiff
 15 alleges that Zillow’s statements are false. *See* Am. Compl. at ¶¶ 203–04. Like Plaintiff’s
 16 claims for false advertising or deceptive acts, Plaintiff alleges that, “Zillow acted as
 17 NAR’s agent when it stated that REX homes are not listed by an agent and that REX
 18 homes are ‘Other Listings.’” *Id.* at ¶ 207. As discussed above, Plaintiff has failed to
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 21 ³ Leave to amend should be freely given, *see* Fed. R. Civ. P. 15(a)(2), and the Court previously provided
 22 Plaintiff leave to amend these claims. Order (docket no. 98 at 25). Like Plaintiff’s initial complaint,
 Plaintiff’s amended complaint does not contain any allegations explaining what NAR did to design or
 encourage the labeling system on Zillow’s websites. Therefore, the Court concludes that granting leave
 to further amend these claims is futile. *See Lopez*, 203 F.3d at 1130.

1 plead any factual allegations and relies on legal conclusions to support its claim that
2 Zillow acted as NAR's agent when making allegedly false statements on its websites.
3 Plaintiff's allegation is too conclusory to plausibly allege that NAR exercised control
4 over Zillow with respect to the statements on Zillow's websites.

5 Plaintiff also alleges that NAR, operating through its member MLSs, "directed and
6 approved" of Zillow's false statements. Resp. (docket no. 102 at 17); *see* Am. Compl. at
7 ¶¶ 205–06. These allegations are solely conclusions without any underlying facts to
8 support Plaintiff's assertions. This type of pleading, without more, cannot support a
9 claim of defamation. Plaintiff's response, docket no. 102, to NAR's motion to dismiss
10 devotes only one page in opposition to the motion as it relates to the defamation claim.
11 Any attempt to replead this defamation claim will be subject to close scrutiny by the
12 Court as to whether the amended complaint complies with the requirements of Federal
13 Rule of Civil Procedure 11(b).⁴

14 The Court GRANTS NAR's motion to dismiss, docket no. 101, the defamation
15 claim, and hereby DISMISSES, without prejudice, the defamation claim asserted against
16 NAR (Count VII).

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19 ⁴ Plaintiff's reliance on *In the Matter of National Housewares*, is misplaced. *See In the Matter of Nat'l*

Housewares, Inc. v. Emdeko Int'l, Inc., 90 F.T.C. 512 (1977). In that case, the Federal Trade
20 Commission was making specific "findings of fact" that respondent had engaged in misleading or
deceptive acts. *Id.* at *10. Similarly, Plaintiff's reliance on *Facebook, Inc. v. Power Ventures, Inc.*, 844
21 F.3d 1058, 1069 (9th Cir. 2016), does not provide support for Plaintiff's defamation claim. Although a
corporate officer or director might be personally liable for torts which he or she authorizes or directs, *see*
id., Plaintiff has not plausibly alleged that NAR authorized or directed Zillow to make false statements on
22 its websites.

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1 **Conclusion**

2 For the foregoing reasons, the Court ORDERS:

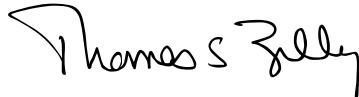
3 (1) NAR's motion to dismiss, docket no. 101, is DENIED in part and
4 GRANTED in part, as follows. The motion is DENIED as to the antitrust claims brought
5 under Section 1 of the Sherman Act and the CPA, RCW 19.86.030 (Counts I & VI). The
6 motion is GRANTED as to the claims for false advertising or deceptive acts brought
7 under the Lanham Act and the CPA, RCW 19.86.020 (Counts III & V), and these claims
8 are DISMISSED with prejudice. The motion is GRANTED as to the defamation claim
9 (Count VII), and this claim is DISMISSED without prejudice and with leave to amend;

10 (2) Plaintiff may file any amended complaint relating solely to the dismissed
11 defamation claim on or before January 13, 2022. Any answer or response is due on or
12 before January 27, 2021. *See* Fed. R. Civ. P. 15(a)(3); and

13 (3) The Clerk is directed to send a copy of this Order to all counsel of record.

14 **IT IS SO ORDERED.**

15 Dated this 20th day of December, 2021.



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17 Thomas S. Zilly
18 United States District Judge
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